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No. 07-543

IN THE
Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, PUBLIC JUSTICE, P.C. AND PICK UP THE PACE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The **National Employment Lawyers Association** (NELA) is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the Supreme Court of the United States in which NELA has filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of Nashville & Davidson County* (no. 06-1595); *SprintD United Management Co. v. Mendelsohn*,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Both parties have consented to the filing of this brief, and letters indicating the parties' consent have been filed with the Clerk of the Court.

128 S.Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 550 U.S. __, 127 S. Ct. 2162 (2007).

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in overcoming glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as *amicus curiae* before this Court in *Burlington Northern & Santa Fe Railway Co. v. White, Ledbetter v. Goodyear Tire & Rubber Co., BCI Coca-Cola Bottling Company of Los Angeles v. Equal Employment Opportunity Commission,* and *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee.*

Public Justice, P.C. is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the courts. We specialize in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless. In fighting against discrimination and retaliation, we have litigated numerous cases under federal civil rights statutes, including Title VII of the

Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Public Justice believes that AT&T's present-day application of a facially discriminatory pension-setting policy violates Title VII, and is concerned that AT&T's narrow interpretation of Title VII, if adopted, would leave thousands of women vulnerable to pregnancy-based sex discrimination perpetrated 30 years after the enactment of the Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

Thirty years after the passage of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) ("PDA"), AT&T continues to calculate retirement benefits in a manner that discriminates against women who took leaves of absence on account of pregnancy during the course of their employment. The Respondents are AT&T employees who took pregnancy-related leaves of absence before the passage of the PDA, and retired between 1994 and 2000 with smaller pensions than they would have received had AT&T calculated their pension benefits in the same manner as it does for employees who took leaves of absence on account of conditions other than pregnancy. In AT&T's view, it should be free, today, to continue calculating pensions using a system that gives less service credit to pre-PDA pregnancy-related leave than to other types of disability leave.

Amici NELA, Public Justice and Pick Up the Pace argue that AT&T's position is precluded by the precedent this Court established in *Bazemore v. Friday*, 478 U.S. 385 (1986), and recently reaffirmed in *Ledbetter*

v. Goodyear Tire & Rubber Co., 550 U.S. __, 127 S. Ct. 2162 (2007). Under *Bazemore* and *Ledbetter*, employers violate Title VII when they make present-day compensation decisions using systems that perpetuate disparities created by pre-enactment discrimination—as AT&T did here when, at the time of Respondents' retirement, it calculated their pension benefits using its "NCS computation system."

ARGUMENT

I. *BAZEMORE v. FRIDAY* ESTABLISHED THE CONTOURS OF AN EMPLOYER'S DUTY TO RESPOND WHEN TITLE VII, AS AMENDED, RENDERS ITS EMPLOYMENT PRACTICES UNLAWFUL.

Over twenty years ago in *Bazemore v. Friday*, 478 U.S. 385 (1986), a unanimous Supreme Court squarely addressed and answered the core legal question raised by this case: What are the contours of an employer's duty to change employment practices in response to a change in the law that expands Title VII protection against discrimination in the workplace?

In concert with the *Bazemore* plaintiffs, Solicitor General Charles Fried also petitioned the Court for *certiorari* on behalf of the United States, seeking "review of the court of appeals' ruling that Title VII provides no remedy for the [North Carolina Agricultural Extension] Service's post-Act failure to eliminate disparities in salaries between black and white agents hired *before* 1965, even though there is no dispute that

those disparities had their origin in racial discrimination." *See* Reply Memorandum for the Petitioners on Petition for a Writ of Certiorari, *United States v. Friday*, No. 85-428, *1985 U.S. S. Ct. Briefs LEXIS 507*, at *1 (Oct. 30, 1985).[2] The Government's brief challenged the Fourth Circuit's holding that "as a matter of law, the Service has no obligation under Title VII to eliminate post-Act salary differentials attributable to pre-Act racial discrimination." *Id.* at *3.

Speaking for a unanimous Supreme Court, in a concurring opinion joined by all its members, Justice Brennan wrote:

> "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent

[2] The cited *Bazemore* opinion decided both *Bazemore v. Friday* and *United States v. Friday*.

> an employer continued to engage in that act or practice, it is liable under that statute." (478 U.S. at 395)

Bazemore was decided in the context of Congress' 1972 amendment to Title VII, expanding its coverage to public employers. Prior to the enactment of Title VII, the North Carolina Agricultural Extension Service had maintained a racially segregated workforce, and black employees were paid less than white employees for doing the same jobs. After Title VII went into effect, the Extension Service integrated the workforce, and began to pay new hires on an equal basis. With respect to employees originally hired under the segregated system, however, racial inequality in compensation persisted.

This Court overturned the decision of the Fourth Circuit, disapproving its application of *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to relieve the Extension Service of Title VII liability. In addition, it announced a new set of principles tailored to ensure prompt compliance with Title VII, while balancing the interests of both employers and employees. Its holding protected the Extension Service from retroactive liability for its *past* racial discrimination, but it also provided recovery for *present* discrimination caused by policies and practices that perpetuate pre-existing racial disparities.

Bazemore established the contours of an employer's duty to respond to the expansion of rights created by Title VII and its subsequent amendments: (1) Title VII does not require restitution for pre-enactment

discrimination; (2) discontinuing discriminatory practices is necessary, but may not be sufficient to avoid Title VII liability; and (3) employers who make post-enactment compensation decisions using methods that perpetuate disparities created by pre-enactment discrimination violate Title VII whenever those methods are applied. It was in this context that the Court announced what came to be known as the "paycheck accrual" rule: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Bazemore*, 478 U.S. at 395.

In 2007, this Court announced its controversial *Ledbetter* decision. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __, 127 S. Ct. 2162 (2007). The Court declined to apply *Bazemore's* "paycheck accrual rule" in an individual pay discrimination case that involved neither statutory change nor systemic discrimination. At the same time, as will be argued more fully below, the *Ledbetter* majority took great pains to distinguish the case then before it from *Bazemore*, and to reaffirm the continued vitality of *Bazemore* as precedent for cases involving systemic discrimination, such as this one.

AT&T v. Hulteen presents the classic *Bazemore* scenario, and the Ninth Circuit *en banc* majority below correctly chose to decide the case in accordance with the *Bazemore* principles. *Evans* and its cited progeny are distinguishable as cases that do not involve the duty of an employer to make systematic changes to a facially discriminatory pay structure in response to legislative action. *Ledbetter*, 127 S. Ct. 2162 at 2174 nn.5-6 (distinguishing *Bazemore* from *Evans).*

II. THE NINTH CIRCUIT CORRECTLY APPLIED *BAZEMORE* TO THE FACTS OF THIS CASE.

A. This Case Presents A Classic *Bazemore* Scenario.

The case comes before this Court on stipulated facts set forth in the Joint Appendix ("JA"). AT&T's pension plan calculates benefits based on an employee's "'period of continuous employment in the service of the Company.'" JA 38 ¶17. AT&T maintains a service calculation system that assigns each employee a Net Credited Service Date ("NCS" date), consisting in his or her original date of hire "adjusted" for periods during which no service credit has been accrued. JA 39 ¶18.

Prior to passage of the PDA, AT&T maintained a two-tier leave policy that treated pregnant employees differently from other employees similar in their ability and inability to work. *See generally* JA 47-52 ¶¶66-88. AT&T provided full service credit to employees who took a leave of absence from work on account of disabilities other than pregnancy, but not to employees on leave of absence from work on account of pregnancy. JA 48-49 ¶¶67-68, 71.

The two-tier leave policy also involved other provisions affecting only pregnant employees, which had additional impact on their service credit accrual. Pregnant employees who became temporarily disabled for a different reason received no NCS credit for that period, while employees disabled by reasons other than pregnancy who became temporarily disabled for a

different reason received NCS credit for the entire period of disability. JA 50 ¶¶76-77. Pregnant employees were subject to "forced leave" policies requiring them to begin leaves prior to the onset of pregnancy disability, while employees anticipating temporary disability leave for other reasons were not subject to "forced leave" policies. JA 51 ¶¶81-82. Pregnant employees were not guaranteed reinstatement to the same or similar job at the expiration of their leave, while such reinstatement generally was guaranteed to employees on leave for disabilities other than pregnancy. JA 51-52 ¶¶85-86. Pregnant employees did not receive service credit for time off work attributed to forced leave or failure to reinstate. JA 49-52 ¶¶75-76, 84, 88.

The net result of these discriminatory policies is that women returning from pre-PDA pregnancy leave received a substantial downward service credit "adjustment" to their NCS date ("pregnancy-adjusted NCS date"), whereas employees returning from disability leaves for conditions other than pregnancy retained whatever NCS date they had prior to the disability leave. JA 39 ¶18.

Both before and after the PDA went into effect, AT&T made retirement benefit determinations using its "NCS calculation system" to calculate length of service. Length of service, known as the TOE ("term of employment") was, and is today, computed by subtracting the employee's NCS date from the date of his or her retirement. JA 38, 40 ¶¶17, 22. As a result of the service credit disparity created by AT&T's discriminatory two-tier leave policies, and its current use of pregnancy-adjusted NCS dates to calculate length

of service, Respondents received lower pensions upon retirement than similarly situated employees with the same history of continuous service who were not affected by pregnancy. JA 40-42 ¶¶25-28, 30, 34 (Noreen Hulteen); JA 42-44 ¶¶35-39, 41, 46 (Eleanora Collet); JA 44-45 ¶¶47-49, 52, 55 (Linda Porter); JA 45-47 ¶¶56-59, 63-65 (Elizabeth Snyder).

It is beyond dispute that AT&T's current use of its "NCS calculation system" to calculate retirement benefits perpetuates the disparity created by its pre-Act pregnancy discrimination.[3] Thus, the Ninth Circuit's *en banc* majority correctly analyzed the issues in accordance with the *Bazemore* principles described above, and correctly concluded that AT&T's current pension benefit computation system violates Title VII.

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[3] Respondents and other *amici* argue convincingly that AT&T's disparate treatment of pregnancy leave violated Title VII even before the PDA was enacted. However, whether or not AT&T's policies were legal before the enactment of the PDA is irrelevant to the *Bazemore* analysis presented here:

> "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under the statute."

478 U.S. at 395. Once the PDA went into effect, AT&T no longer could employ a retirement benefit compensation system that perpetuated pre-PDA disparities when making post-PDA compensation decisions, even if it could have done so earlier.

B. AT&T's Arguments for Reversal of the Ninth Circuit's Decision are Foreclosed by *Ledbetter v. Goodyear Tire.*

AT&T urges reversal of the Ninth Circuit's opinion on three grounds: (1) Respondents' challenge is not timely; (2) the challenged practice does not constitute intentional discrimination; and (3) imposing liability on these facts necessarily involves a prohibited retroactive application of the PDA in violation of this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). None of these arguments withstand close scrutiny.

1. Respondents' challenge to AT&T's pension benefit determinations is timely.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __, 127 S. Ct. 2162 (2007), this Court declined to apply *Bazemore's* "paycheck accrual" rule when adjudicating a statute of limitations defense in an *individual* case involving "long-past performance evaluation[s]" made within a facially neutral pay structure. In contrast, it approved its use in cases involving *systemic* practices that are the "mere continuation" of a facially discriminatory payment scheme:

> "Noting that *Evans* turned on whether any present violation existed, Justice Brennan stated that the *Bazemore* plaintiffs were alleging that the defendants had not from the date of the Act forward made all their employment decisions in a wholly

> nondiscriminatory way—which is to say that they had engaged in fresh discrimination. . . . [T]he Court's holding . . . focused on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." (*Ledbetter*, 127 S. Ct. at 2173 (emphases deleted; internal quotation marks, brackets and citations omitted))

AT&T's method for computing retirement benefits is indisputably a "mere continuation" of its pre-existing discriminatory retirement benefit computation structure. *See* II.A, *ante* at 7-10. AT&T engages in fresh discrimination today when, by using pregnancy-adjusted NCS dates to compute longevity of service, it re-imposes the service credit disparity created by its pre-PDA discriminatory pregnancy leave policies.

The distribution of retirement benefits pursuant to a discriminatory computation system is a "freestanding violation" that "may *always* be charged within its own charging period *regardless of its connection to other violations.*" *Ledbetter*, 127 S. Ct. at 2174 (emphasis added). Furthermore, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure." *Id.*

Respondents filed EEOC charges within the charging period applicable to benefit determinations, and have complied with all the administrative prerequisites for filing a lawsuit alleging violation of

Title VII. JA 55 ¶97. Because these benefit determinations constitute current acts of discrimination, Respondents actions are timely.

2. AT&T's pension benefit calculation system is a discriminatory pay structure within the meaning of *Ledbetter*.

In *Ledbetter*, this Court explicitly reaffirmed *Bazemore's* holding that retention of a facially discriminatory pay structure constitutes intent to discriminate: "An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate . . . *as long as the structure is used.*" 127 S. Ct. at 2173 (emphasis added). Justice Alito did caution, however, that a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied. *Id.* at 2174. AT&T challenges the Ninth Circuit decision on that basis as well.

AT&T's pension benefit determination system meets the *Ledbetter* definition of a facially discriminatory pay structure, *i.e.*, one that puts some employees on a lower scale because of their membership in a protected category. *Id.* at 2173. The use of pregnancy-adjusted NCS dates to compute longevity of service puts employees affected by pregnancy at a lower pension benefit level simply because of their membership in that protected category.

AT&T's pension benefit determinations are made using its "NCS system" which, on its face (1) credits

time spent on leave for all temporary disabilities except pre-PDA pregnancies, and (2) excludes time off work created by policies and practices that were applied *only* to pre-PDA pregnancies (*e.g.*, forced leave, subsequent disability).[4] As a result, employees affected by pre-PDA pregnancies are classified as having shorter terms of employment, and their pension benefits are set at a correspondingly lower level.

Contrary to AT&T's assertion, a system need not explicitly label the disparate treatment it imposes as sex discrimination in order for it to be "facially" discriminatory. After enactment of the PDA, a retirement benefit computation system that continues to treat employees affected by pregnancy less favorably than other employees "similar in their ability or inability to work" facially discriminates against them on the basis of sex, even if it is called an "NCS system." 42 U.S.C. §2000e(k); *Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). Discriminatory animus is not required either. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect).

[4] Indeed, continued use of this system puts AT&T in direct violation of the Pregnancy Discrimination Act, which requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).

Furthermore, AT&T's "NCS system" is not neutrally applied. The system is applied to discriminatory "NCS dates" created by AT&T's now discontinued two-tier leave system. Thus, Respondents' "adjusted" NCS dates are no more "neutral" than the lower base salaries of black employees in *Bazemore* who began employment under the racially segregated system that predated Title VII. Continued use of pregnancy-adjusted NCS dates to compute current retirement benefits is the functional equivalent of continuing to use racially discriminatory salaries as the basis upon which to compute post-Title VII salary increases.

Respondents' pregnancy-adjusted NCS dates constitute an enduring record of past disparate treatment that was made illegal by the PDA. These dates cannot credibly be described as "neutral" because they do not accord equal value to the *actual* service provided by similarly situated employees. Thus, when AT&T used pregnancy-adjusted NCS dates to compute Respondents' length of service for the purpose of determining the size of their pensions, it cannot be said to have made those pension determinations in a "wholly nondiscriminatory way." *Ledbetter*, 127 S. Ct. at 2173 (quoting Justice Brennan in *Bazemore*).

A comparison with the facts at issue in *Ledbetter* confirms the stark difference between the two cases. Lily Ledbetter contended that her salary reflected the effects of long-past, intentionally discriminatory performance evaluations made by individual supervisors (including a key supervisor who had died before trial) within a facially-neutral payment structure. *Ledbetter*,

127 S. Ct. at 2165-66, 2171. Proving her claim would have required a "subtle determination" that discriminatory intent could be inferred from a stale and circumstantial record. *Id.* at 2171. An evaluation of AT&T's policy, by contrast, requires neither subtle determinations nor resort to stale, circumstantial evidence.

Accordingly, it is clear that AT&T's pension benefit determination system is neither facially nondiscriminatory nor neutrally applied, and that AT&T engages in intentional discrimination whenever it uses pregnancy-adjusted NCS dates to determine a retiring employee's pension benefits.

3. Application of the *Bazemore* principles to AT&T's retirement benefit calculation system does not constitute retroactive application of the PDA.

AT&T argues that application of the *Bazemore* principles to its retirement benefit calculation system would give the PDA an impermissible retroactive effect under *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). Application of a statute is retroactive if it impairs rights a party possessed when it acted, increases a party's "liability for past conduct, or imposes new duties with respect to transactions already completed." *Id.* at 280. None of these conditions obtain here.

First, the Ninth Circuit decision does not impair rights AT&T had when it treated pregnant women differently from similarly situated employees prior to the enactment of the PDA. The legality of AT&T's pre-PDA treatment of pregnant employees is simply not

an issue in this case.[5] After the enactment of the PDA, AT&T quite clearly no longer had a right to treat women affected by pregnancy differently from other employees similar in their ability or inability to work. Therefore, it does not now have a right to pay women affected by pregnancy during the course of their employment lower pension benefits than other employees with identical service histories.

Second, the Ninth Circuit decision did not increase AT&T's liability for conduct that pre-dates the PDA. *Bazemore* does not sanction the awarding of restitution for pre-Act discrimination, and the Ninth Circuit did not impose any in this case.

Third, applying *Bazemore* to AT&T's pension calculation system does not impose new duties with respect to a transaction already completed *at the time the PDA went into effect. Bazemore* established a duty to eliminate *post-Act* disparities created by pre-PDA practices—which is precisely what AT&T did not do.[6]

Finally, it bears noting that nothing mandates AT&T's continued use of a system employing pregnancy-adjusted NCS dates to calculate pension

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[5] *See* n.3, *ante*, at 10.

[6] Because of AT&T's tenacious insistence on perpetuating pre-Act disparities through its pension determination apparatus, it faces liability for "completed" retirement calculations made *after* the enactment of the PDA *and* subject to a timely filed charge. Such liability is the normal consequence of failure to comply with a statutory mandate—it does not constitute retroactive application of the statute.

benefits. JA 56 ¶¶101,104. AT&T easily could have taken steps to avoid any liability for its retirement benefit calculation system. AT&T could have continued to use the system to calculate retirement benefits, without running afoul of Title VII, if it had simply recalculated Respondents' NCS dates to accurately reflect their longevity of service. Alternatively, AT&T could have chosen to employ a different measure of longevity, one that does not re-impose the pre-PDA service credit disparity on present retirement benefit calculations. Or it could have filed a declaratory relief action seeking clarification of its rights and obligations.[7]

What it could *not* do was to choose "mere continuation" of its discriminatory pay structure. *Ledbetter*, 127 S. Ct. at 2173 (citing *Bazemore*).[8]

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[7] AT&T's inaction in the face of uncertainty about its legal obligations contrasts sharply with the aggressive approach of its Midwestern counterpart, described in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 1991), *cert. denied*, 531 U.S. 1127 (2001). Having adopted an enhanced pension plan in 1994, Ameritech "jumped into court with an action for a declaratory judgment" in defense of its continued use of pregnancy-adjusted NCS dates to compute pension plan eligibility. *Id.* at 816. While treating it as a close question, the Seventh Circuit ruled in Ameritech's favor, creating the circuit conflict that this Court now is called upon to resolve. It was not until 1999 that AT&T (unsuccessfully) sought declaratory relief from the D.C. Circuit. *See AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001).

[8] AT&T continued to use pregnancy-adjusted NCS dates to compute retirement benefits within the jurisdiction of the Ninth Circuit even after this Court denied certiorari in *Pallas*

(Cont'd)

By making that choice, AT&T commits a *new* act of discrimination *in the present* each time it uses that structure to calculate retirement benefits. Plainly, imposing liability on AT&T for this choice does not constitute retroactive application of the PDA.

CONCLUSION

Twenty years after this Court's decision in *Bazemore v. Friday*, AT&T insists upon its right to discriminate against female employees who took pre-PDA pregnancy leaves when it computes their pensions. Even if AT&T were uncertain of its obligations after the PDA was enacted in 1978, there is no excuse for its failure to discontinue reliance on pregnancy-adjusted NCS dates after *Bazemore* was decided in 1986.

From a public policy perspective, this case vividly illustrates the continuing importance of the *Bazemore* principles as a spur to timely compliance with Title VII mandates. Were this Court to find in favor of AT&T, it not only would deprive these respondents of their right to equal pension benefits; it also would impede Title VII enforcement by creating a perverse incentive toward

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(Cont'd)

v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). In *Pallas*, the Ninth Circuit held, on virtually identical facts, that AT&T's predecessor-in-interest violated Title VII. The Ninth Circuit *en banc* majority below took note of "AT&T's "truculent refusal" to change its employment practices in the sixteen-year interval following *Pallas*. *See Hulteen v. AT&T Corp.*, 498 F. 3d 1001, 1004 n.1 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2957 (2008); *see also id.* at 1010.

inaction in response to statutory amendments that expand protection against discrimination in the workplace.

For all of the above reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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